No. 94-1511 (6)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SAMUEL LEWIS, *et al.*,
Petitioners,
v.
FLETCHER CASEY, JR., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE PETITIONERS

REX E. LEE
CARTER G. PHILLIPS
MARK D. HOPSON
JACQUELINE GERSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

GRANT WOODS
Attorney General
C. TIM DELANEY
REBECCA WHITE BERCH
THOMAS J. DENNIS
ARIZONA ATTORNEY GENERAL'S OFFICE
1275 W. Washington
Phoenix, Arizona 85007
(602) 542-3333

DANIEL P. STRUCK
Counsel of Record
KATHLEEN L. WIENEKE
DAVID C. LEWIS
EILEEN J. DENNIS
JONES, SKELTON & HOCHULI
2901 N. Central Avenue
Suite 800
Phoenix, Arizona 85012
(602) 263-1700
Attorneys for Petitioners

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QUESTION PRESENTED

Whether the district court's order in this "access to courts" case, which greatly expands the State of Arizona's financial and administrative burdens and shifts much of the management of the State's prison system to the federal judiciary, exceeds the constitutional requirements set forth in *Bounds v. Smith*, 430 U.S. 817 (1977).*

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* Petitioners are the following prison officials of the Arizona Department of Corrections: Samuel A. Lewis, Director; Warden Robert Goldsmith, Arizona State Prison Complex, Florence; Warden William Rhode, Arizona State Prison Complex, Perryville; Warden George Herman, Arizona State Prison Complex, Douglas; Warden Roger Crist, Arizona State Prison Complex, Tucson; Warden Hal Cardin, Arizona State Prison Complex, Phoenix.

Respondents include twenty-two class representatives, on behalf of themselves and all other similarly situated as inmates in the Arizona Department of Corrections. The twenty-two representative plaintiffs are Fletcher Casey, Jr., Stephen James, Frank Bartholic, Armando Munoz, Kyle Baptisto, David A. Mann, Jeffrey Lustig, Terry Don McFalls, Randy Sampson, John Tomlin, Scott Tramposch, Pamela McQuillen, Carolyn Ferguson, Yvonne Martin, David Tucker, Susan Colker, John Myers, Mary Jo Booker, Randy Thomas, Ruth Johnson, Roman Stone, and Robert Bankston.

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BRIEF OF THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals is reported at 43 F.3d 1261; Pet. App. A at 1a. The opinion of the district court is reported at 834 F. Supp. 1553; Pet. App. B at 19a. The district court's October 13, 1993 permanent injunction (Pet. App. C at 57a) is unreported, and was stayed by this Court in an order published at 114 S. Ct. 1638; Pet. App. D at 86a.

JURISDICTION

The district court's jurisdiction was invoked under 42 U.S.C. § 1343(3) (1991) and 28 U.S.C. § 1331 (1993). The United States Court of Appeals for the Ninth Circuit entered its judgment on December 27, 1994. The Peti-

tion for Writ of Certiorari was filed in this Court on March 14, 1995, and was granted on May 22, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1993).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment provides, in relevant part:

> [N]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is an inmate "access to the courts" class action against Petitioners, who are prison administrators for the Arizona Department of Corrections ("ADOC"). Although Arizona provides its inmates with access to dozens of law libraries across the State, each stocked with an impressive array of legal materials, plus support from inmate law clerks and legal assistants, the Hon. Carl A. Muecke, District Judge for the District of Arizona, held that Arizona's program was insufficient to satisfy the inmates' right of access to the courts under *Bounds v. Smith*, 430 U.S. 817 (1977). Without identifying any system-wide constitutional violation, the district court nevertheless issued a minutely detailed, system-wide injunction that administers essentially all aspects of Arizona's program of providing inmates access to the courts.

The Ninth Circuit affirmed. The issues before this Court are whether the lower courts erred in finding a constitutional violation at all, and whether the lower courts' system-wide and intrusive injunction is invalidly overbroad and so far exceeds the requirements of the Constitution as to usurp the State's executive power to administer the law and its legislative power to spend, in violation of principles of both federalism and separation of powers.

1. *Arizona's Prison System.*

The Arizona prison system consists of nine separate complexes spread across the State, each of which contains several individual housing units. R.T. 1/27/92 at 11-12. At the time of trial in 1992, Arizona housed 15,346 inmates, and had 26 law libraries. *Id.* Since then, the system has expanded to more than 22,000 inmates and 33 law libraries. Libraries are located at each of the nine prison complexes. In most cases, each housing unit has its own separate law library. Inmates in housing units without libraries have access to libraries in adjacent housing units within the complex. R.T. 1/14/92 at 92-93; J.A. 182-184.

2. *Arizona's Policies and Practices Regarding Inmate Access to the Courts.*

ADOC devotes considerable resources and personnel to providing inmates with law libraries, legal assistants, and basic supplies so that inmates can have meaningful access to the courts. The policies and practices are summarized below.[1]

a. *Law libraries.* Every prison library in Arizona is stocked, at a minimum, with all the books on the "Muecke List."[2] The "Muecke List" is a list of law books that Judge Muecke, in *Wilkinson v. McDougall*, CIV 81-1397 (D. Ariz. 1984), ruled were constitutionally required to be provided to inmates in the Central Unit law library at the Florence complex. Pet. App. B at 32a-33a.

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[1] The attached Appendix "A" summarizes undisputed evidence about the law libraries in the Arizona prison system at the time of trial. The chart presents the number of inmates at each unit, the number of library staff at each library, whether "shelf browsing" is permitted, and whether each law library contains the books from the "Muecke List." The data are taken from the parties' stipulation, J.A. 37-63, Pet. App. B at 19a-41a, and undisputed evidence at trial.

[2] Referred to by the district court as the "Muecke List." Pet. App. B, at 32a.

The "Muecke List" contains the following materials: United States Code Annotated; Supreme Court Reporter; Federal Reporter (Second) and (Third); Federal Supplements; Shepard's U.S. Citations; Shepard's Federal Citations; Local Rules for the Federal District Court; Modern Federal Practice Digest; Federal Practice Digest (Second); Arizona Code Annotated; Arizona Reports; Shepard's Arizona Citations; Arizona Appeals Reports; Arizona Law of Evidence (Udall); ADC Policy Manual; 108 Institutional Management Proceedings; Federal Practice and Procedures (Wright); Corpus Juris Secundum; and Arizona Digests. Pet. App. B at 32a-33a. Some of the libraries additionally contain self-help litigation manuals, including the 1983 edition of the *Prisoner's Self-Help Litigation Manual*. Several libraries also contain the Pacific Reporter (Second) series. Pet. App. B at 34a.

The library system maintains an interlibrary loan program. Thus, libraries that do not have a particular volume of interest to an inmate may obtain a copy from other prison libraries that have it or from the Arizona State University Law School library. R.T. 1/7/92, p. 98; J.A. 149-150.

b. *Library hours.* Pursuant to departmental policy, all law libraries in the prison system must be open for inmate use at least twelve hours per day, between the hours of 7:00 a.m. and 10:00 p.m., seven days a week. Exhibit 785. Law libraries can obtain exemptions to the law library hour requirement, depending on usage. Most of the law libraries received exemptions because of the actual low usage. J.A. 43-44; Appendix A. For example, on average, only three inmates per week were using the law library at Yuma, so an exemption was issued to shorten the library's hours. R.T. 1/27/92, pp. 33-34; J.A. 212-213. Most of the law libraries are open in excess of forty hours per week. J.A. 38-49; Appendix A. Inmates may request additional law library time whenever needed. J.A. 38-40, 42, 44, 46-48.

c. *Inmate access to the libraries.* General-population inmates may "browse" the bookshelves in most law libraries. Appendix A. In all of the units at the Perryville complex and the Kaibab unit at the Winslow complex, however, inmates must go to the counter and ask a law clerk to retrieve materials. Inmates need not give an exact citation. Instead, they can receive materials by making a general request. R.T. 1/15/92 at 144; J.A. 209. Administrators at the Perryville complex terminated browsing at the unit law libraries after discovering that inmates had vandalized the legal materials. J.A. 148-149; Exhibit 834. The Kaibab library cannot physically accommodate shelf-browsing by inmates due to space limitations. Pet. App. B at 20a.

For high security inmates, physical access is restricted because of safety and security concerns, in keeping with the greater physical restrictions that are required for these inmates. Two types of high security inmates exist. First, the "lockdown" facilities at the Special Management Unit (SMU) and Cellblock 6 (CB-6) in the Florence complex house the most dangerous and violent prisoners in the Arizona prison system. These prisoners are at such "a very high custody level," that two prisoners "can't be in any common area at any time, restrained or unrestrained." R.T. 1/7/92 at 154; J.A. 162. These prisoners are permitted access to the law libraries, but must remain in glass-encased stalls inside the law library when they conduct legal research. Pet. App. B at 20a; *Casey v. Lewis*, 4 F.3d 1516, 1519 (9th Cir. 1993). The separate stalls permit several prisoners to use the library at once, in a manner that preserves security. R.T. 1/7/92 at 154; J.A. 162-163. These prisoners request and receive legal materials from a law clerk or library personnel. R.T. 1/15/92 at 144; J.A. 208-209.

Second, some inmates, for disciplinary or security reasons, are segregated from general-population inmates in lockdown cellblocks within a prison complex. These are

known as Complex Detention Units ("CDUs").[3] These inmates are housed in CDUs pending a disciplinary hearing or transfer to a maximum security unit. R.T. 1/27/92 pp. 39-40; J.A. 213-214. At the time of trial, approximately 261 Arizona inmates were segregated in CDUs. R.T. 1/27/92 at 8-20. CDU inmates are denied physical access to the law library for several reasons. For example, two officers must transport a lockdown inmate across a prison yard containing general-population inmates to the library—producing a potentially volatile situation for both inmates and officers. R.T. 1/27/92 at 8-20. Providing two-guard escorts requires additional staffing. Even with the use of escorts, mixing general population inmates with segregated inmates creates a security risk. R.T. 1/27/92 at 39-40; J.A. 213-214.

To provide high security inmates with access to the law library while also avoiding the security and logistical problems of transporting CDU inmates to the libraries, ADOC permits materials to be brought to such inmates. Lockdown inmates who seek legal materials or a legal assistant send a written request to the law library. R.T. 1/27/92 at 39; J.A. 213. The legal materials are then brought to the inmate's lockdown cell, *id.*; Pet. App. B at 21a, generally within twenty-four hours of the request. R.T. 1/15/92 at 107-108; J.A. 195-196. CDU inmates are usually allowed to keep their materials for more than twenty-four hours. *Id.* There is no restriction on the number of books an inmate can request. R.T. 1/7/92 at 86, 112; J.A. 144-145, 156.

d. *Library personnel.* At the time of trial, eight of the twenty-six unit law libraries employed full-time librarians. Appendix A. All of the librarians had either a master's or an undergraduate degree in library science. R.T. 1/7/92, pp. 74, 75, 80, 150, 151, 152; J.A. 137-138, 141, 160-161; R.T. 1/15/92, pp. 94-96, 100, 142;

[3] CDUs are located at the Douglas, Perryville, Winslow, Tucson, and Alhambra complexes. R.T. 1/27/92 at 8-20.

J.A. 186-88, 190, 208. The other libraries were managed by correctional service officers. Appendix A. The librarians and correctional service officers in charge of law libraries attended annual, three-day seminars where law library training was conducted by the Director of Library Services. *Id.* Librarians and correctional service officers also attended a nine-week course, which covered topics on constitutional law and post-conviction law. R.T. 1/7/92, pp. 261-262; J.A. 174-175. Librarians also attended other workshops and seminars for training purposes. *Id.* In addition, Petitioners employed at least fifty-five inmate law clerks who provided general library services and specific research assistance to inmates, and maintained the law library collections. J.A. 50-54; Appendix A.

e. *Legal assistance.* All inmates may request assistance from law clerks and legal assistants. Law clerks are inmates who are paid to provide general library research assistance, such as assisting library personnel in locating materials. Law clerks do not assist inmates specifically in preparing pleadings. R.T. 11/22/91 at 152; R.T. 12/17/91 at 257; R.T. 12/19/91 at 120-121; J.A. 66-67, 130-131. An inmate can be both a law clerk and a legal assistant. *Id.*

Legal assistants are unpaid volunteers who assist other inmates by preparing their cases and drafting pleadings. Legal assistants are chosen from inmates who are determined to be capable of assisting other inmates with legal research and writing and whose institutional records indicate the ability to handle the responsibilities of an inmate legal assistant. Exhibit 785. At the time of trial, there were at least ninety volunteer legal assistants throughout the State. J.A. 50-54; Appendix A.

f. *Qualification and training of legal assistants.* In most Arizona prison complexes, inmates apply to the warden to become legal assistants. Pet. App. B at 30a. Two ADOC complexes have developed tests for inmates seeking to become law clerks and legal assistants. *Id.*

With respect to training, the Central Unit in Florence has an extensive training program for legal assistants. The Tucson complex provided an 18.5 hour program for inmate legal assistants in July, 1990. Pet. App. B at 30a-31a. Aside from these programs, ADOC has no mandatory training program for inmates or civilians who provide legal assistance. Pet. App. B at 30a. Paralegal courses are available, however, through correspondence or closed-circuit television. Pet. App. B at 31a; R.T. 1/7/92 at 186-187; J.A. 127. Many law clerks and legal assistants have completed or are currently taking paralegal courses. R.T. 12/17/91 at 253; 12/18/91 at 101; and R.T. 12/19/91 at 113; J.A. 101, 105, 127.

g. *Non-English assistance.* Generally, non-English speaking inmates are assisted by interpreters. ADOC recruits bilingual inmate legal assistants for inmates who do not speak or read English. R.T. 1/15/92, p. 100; J.A. 190; Exhibit 785. Inmates who do not speak English may obtain assistance from bilingual law clerks, legal assistants, staff members or inmate translators. R.T. 12/18/91, p. 106; R.T. 12/19/91, p. 114; R.T. 1/14/92, p. 92; R.T. 1/15/92, p. 100; R.T. 1/27/92, p. 110; J.A. 108-109, 127-128, 182-183, 190.

h. *Access to counsel.* It is ADOC policy that correspondence is the primary means of communication between an inmate and his attorney. R.T. 1/27/92, pp. 40-41; J.A. 214-215. When an inmate has a court deadline or an immediate need to speak to an attorney, a telephone call can be arranged. *Id.* Telephone calls are scheduled as soon as they can be arranged, generally within twenty-four to forty-eight hours after the request. Inmate requests for telephone calls are granted unless the inmate is abusing the system. R.T. 1/14/92, p. 94; J.A. 184-185. Telephone calls are made in a counselor's office on a non-monitored telephone line. R.T. 1/27/92, pp. 40-41; J.A. 214-215. The counselor may remain in the office while

the inmate makes the telephone call, but counselors are instructed not to listen to the calls and will leave the office if requested. R.T. 1/27/92, p. 41; J.A. 214-215; R.T. 1/15/92, p. 137; J.A. 206-207; R.T. 1/14/92, p. 95; J.A. 185.

i. *Photocopying.* Under departmental policy, inmates receive photocopies of court documents and other legal papers within forty-eight hours of their request to duplicate them. Exhibit 785; R.T. 1/7/92, pp. 102-103, 162-164, 265; J.A. 151-152, 165-167, 176-177; R.T. 1/15/92, pp. 108-109; J.A. 195-197. An inmate may receive copies in less time if necessary to meet a legal deadline. *Id.* Inmates may observe while their documents are being photocopied. *Id.* The photocopies are scanned visually to make sure they are legal documents and do not contain contraband. Otherwise, the documents are not read. *Id.*

3. *The Proceedings Below.*

a. *District Court.* Twenty-two Arizona inmates filed this class action pursuant to 42 U.S.C. § 1983 claiming, *inter alia*, that Arizona prison officials unconstitutionally denied them meaningful access to the courts. After a bench trial, the district court ruled in the inmates' favor. Pet. App. B at 48a.[4] The district court appointed a special master to design a legal access program (Pet. App. E), which the court adopted in its October 13, 1993 permanent injunction order. Pet. App. C at 50a-85a.[5]

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[4] Although this Court has repeatedly criticized lower courts for "their verbatim adoption of findings of fact prepared by prevailing parties," *Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 & n.4 (1964), the district court in this case adopted the prisoners' proposed findings in their entirety. *Compare* Pet. App. B at 19a-41a with R. 362 at 212-233.

[5] The permanent injunction was taken almost entirely from a previous injunction drafted by the same special master in *Gluth v. Kangas*, 951 F.2d 1504 (9th Cir. 1991). *Compare* Pet. App. C at 50a-85a with Pet. App. E at 96a-113a.

The minutely-detailed injunction is sweeping in scope and imposes upon the State an array of extraordinary remedies. Despite the absence of *any* specific findings that ADOC policies either resulted in a classwide violation or caused a member of the class to suffer constitutional injury, the district court ordered system-wide relief. The injunction required Petitioners, among other things, to:

> (1) open all ADOC law libraries between fifty and eighty hours per week, including night and weekend hours, regardless of demand (Pet. App. C at 62a);
>
> (2) allow inmates, regardless of their security status, to determine where and with whom they could sit in the libraries (*id.* at 63a);
>
> (3) provide fully equipped law libraries at every prison unit with a capacity of 150 inmates (*id.* at 61a);
>
> (4) hire full-time, professionally trained librarians with law or paralegal degrees for every law library (*id.* at 67a);
>
> (5) provide a fifty to sixty-hour training course for inmate legal assistants every six months, consisting of a thirty to forty-hour video component and a twenty-hour live component (*id.* at 71a-72a);
>
> (6) provide a weekly minimum of three twenty-minute telephone calls to an attorney, an attorney representative, or legal organization (*id.* at 76a);
>
> (7) purchase a complete, up-to-date set of Pacific Reporters and Digests for each law library (*id.* at 69a);
>
> (8) permit all inmates direct access to library stacks, unless Petitioners can first document an actual security risk (*id.* at 61a);
>
> (9) provide the special master with the prison's schedules of activities and events, the names of all library employees, and their specific work schedules (*id.* at 63a);

> (10) permit inmates to select the times at which they will use the law libraries (*id.* at 63a-65a);
>
> (11) accede to the conditions imposed by the court for the removal of inmates from the libraries, as well as the removal of legal assistants (*id.* at 67a, 71a); and
>
> (12) correct all structural or acoustical problems to reduce noise level in the libraries (*id.* at 68a).

This relief ensures inmates obtain not just reasonable access, but optimal access to the courts—access that far exceeds that available to ordinary residents of the State.

The injunction also creates an ongoing, and essentially permanent, role for the special master in managing the State's prisons.[6] Among other things, the special master must:

- analyze the library and inmate turnout schedules to assess library attendance and determine whether any alterations are required for adequate access (*id.* at 64a);
- oversee the preparation of, and grant final approval to, an introductory guide to the use of the law libraries in Spanish and English (*id.* at 66a);
- work with ADOC officials to secure qualified applicants for librarian positions (*id.* at 67a);
- approve the hiring of law librarians who have library science degrees, rather than law or paralegal degrees (*id.*);

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[6] In its order appointing the special master, the district court required ADOC officials to deposit *at least $5,000 a month* in a bank account maintained for use by the special master and his assistant. Pet. App. E at 94a. This account was reserved solely for the special master's costs, such as travel and office expenses. *Id.* The special master and his assistant billed ADOC an average of approximately $12,000 *per month* in fees and costs while monitoring the prison system before this Court issued the stay, even though the injunction was not yet implemented.

- assist in identifying appropriate self-help manuals and forms for the libraries, and approving their use (*id.* at 69a); and
- review the proposed syllabus and schedule, as well as the instructor's experience, for each live offering of instruction to the legal assistants (*id.* at 72a).

In addition, the ADOC must provide to the special master copies of many of the official records and notices that ADOC is required to produce daily in administering the injunction, such as the daily log book pages for the law libraries (*id.* at 63a), the written notices of reasons provided to inmates when they are removed from the library for disruptive behavior (*id.* at 67a), and the written notices provided to inmates when they are denied legal assistant status (*id.* at 70a).

b. *Ninth Circuit.* The Ninth Circuit affirmed the injunction in all relevant respects.[7] The court held that (1) ADOC violated the right to court access by failing to staff all libraries with trained bilingual legal assistants, Pet. App. A at 8a; *Casey v. Lewis*, 43 F.3d 1261, 1267 (9th Cir. 1994), and (2) the 261 "lockdown" inmates with previous disciplinary or security problems were entitled to physical access, "unless ADOC can demonstrate actual security risks." Pet. App. A at 6a; *Casey, id.* In response to ADOC's argument that the scope of the injunction far exceeded the requirements of the Constitution as set forth in *Bounds v. Smith*, 430 U.S. 817 (1977),

[7] The court of appeals vacated in part and remanded in part on issues not directly germane to this case. Pet. App. A at 17a-18a. The issues remanded concern the $46 indigency standard imposed by the district court, the proper copying costs, and the district court's refusal to allow Petitioners any opportunity to object to the fees of the special master. The only portion of the injunction vacated by the Ninth Circuit was the ordered purchase of electric typewriters, which Respondents conceded on appeal were not constitutionally required.

the Ninth Circuit simply held that the district court had "broad" and inherent powers to fashion equitable relief. Pet. App. A at 13a; *Casey*, 43 F.3d at 1270. While acknowledging that the remedy must do no more than correct a specific violation, and that the remedy may not unduly intrude into the administration of the prison system, the Ninth Circuit upheld the remedial measures the district judge ordered. Petitioners applied for and this Court stayed the injunction pending the timely filing of a petition for writ of certiorari. *Lewis v. Casey*, 114 S. Ct. 1638 (1994); Pet. App. D at 86a.

SUMMARY OF ARGUMENT

The district court in this case has arrogated to itself the executive and legislative functions of operating a State's prison operation as it relates to the use of legal resources. The court attempted to micromanage virtually every aspect of the prison library, from when a library must remain open to what access to the shelves is appropriate for prison inmates. This extraordinary remedial decree is unsupported by any systemic violations of the Constitution that could remotely support the breathtaking sweep of the district court's actions.

For two independent reasons, the judgment of the lower courts must be reversed. First, under this Court's decisions interpreting the Due Process and Equal Protection Clauses as they apply to inmates, Respondents have not proven a constitutional violation. Second, even if some constitutional violation had been established, the breadth of the injunction violates this Court's well-established principle that the remedy be no broader than necessary to cure the violation.

1. Although the text of the United States Constitution does not identify an inmate's "right of access" to the courts, this Court has held that the Due Process and Equal Protection Clauses prohibit the imposition of arbitrary barriers to inmates' access. State regulation of inmates'

access to the courts is not, however, subject to heightened scrutiny. Inmates are not a "suspect" class, and access to law libraries and legal assistants is not a fundamental right. Under *Turner v. Safley*, 482 U.S. 78 (1987), rational basis review is the proper standard for assessing prison regulations that allegedly infringe inmates' access rights.

Prior to *Bounds v. Smith*, 430 U.S. 817 (1977), this Court held that the Constitution precludes the States from imposing unique burdens on inmates' ability to engage in litigation simply because of their status. *See, e.g., Johnson v. Avery*, 393 U.S. 483, 490 (1969); *Ex Parte Hull*, 312 U.S. 546, 549 (1941). In *Bounds*, the Court held, consistent with its prior decisions, that the States must also provide inmates with basic supplies and access to legal materials, not otherwise available because of their confinement, so that inmates can present their claims in court. The inquiry is whether a particular resource is necessary to give inmates a "reasonably adequate opportunity" to present their claims. This Court did not intend to require "optimal access." Nor did it command that inmates must have access to any particular type of library or form of legal assistance.

The Court also recognized that what is "reasonably adequate" must be evaluated in light of the liberal "notice" pleading standard that is used to evaluate papers filed by *pro se* litigants. *Haines v. Kerner*, 404 U.S. 519, 5204 (1972). Because courts are obligated to apply the law liberally in such matters and can appoint counsel to represent inmates who may have valid claims, the requirements for access are quite minimal.

Finally, the States' obligation to provide access should be interpreted in light of the special need for judicial deference to decisionmaking by prison officials. *Turner*, 482 U.S. at 84-85. Principles of federalism and separation of powers counsel judicial restraint absent the clearest proof of systemic constitutional violations.

2. To establish a violation of their constitutional rights, Respondents must demonstrate that Arizona's policies either impose arbitrary and irrational barriers to access or that the State fails to provide the minimal materials and resources that are necessary to overcome the inherent limitations of confinement. Neither showing has been made in this case. Accordingly, no constitutional violation has been demonstrated.

As an initial matter, the lower courts fundamentally misanalyzed the liability issue by concluding that there was a constitutional violation despite the fact that Respondents failed to prove that they suffered any cognizable constitutional injury, such as the inability to raise a claim or meet a filing deadline, as a result of Arizona's policies. Moreover, the State's policies do not impose any arbitrary barriers to access and clearly satisfy the minimal affirmative obligation to provide resources necessary to provide reasonably adequate access. *Bounds* requires "adequate law libraries or adequate assistance from persons trained in the law," but not both. All of Arizona's prisoners have such access. First, all of Arizona's prison libraries already contain the extensive "Muecke List" law books—and some contain more extensive collections—and certainly meet the minimum standard of *Bounds*.

Illiterate or non-English speaking inmates not only have physical access to these well-stocked libraries, but also have help from legal assistants. This access, which places these inmates in at least the same position as their civilian counterparts, satisfies constitutional requirements.

Finally, segregated high-risk inmates have adequate access to law books via the paging system, and they have additional access to inmate law clerks and legal assistants. Arizona's restrictions on their physical access to the library are reasonably related to the State's legitimate penological interests.

Because no constitutional violation occurred here, the lower courts overstepped their Article III authority in ordering the State to implement a system-wide program of penal reform.

3. Even if some aspect of Arizona's legal access program is constitutionally inadequate, the exhaustive system-wide remedy is grossly overbroad. As the Court made plain last Term in *Missouri v. Jenkins*, 115 S.Ct. 2038 (1995), a federal court's remedy must relate to the original violation and must do no more than correct that specific violation. Here, the injunction does not relate to any identified constitutional defect. Rather, it imposes a sweeping system-wide remedy, with no findings of a system-wide violation.

Moreover, an examination of the individual components of the injunction reveals that all of them are overbroad, and not adequately supported by any finding of a constitutional violation. For example, the injunction's requirement that lockdown prisoners be permitted direct access to the stacks is not supported by any finding that inmates have suffered a constitutional injury from the current policy, and ignores the State's legitimate penological objective of preventing situations that present the risk of violence. The remaining components of the district court's order suffer from the same fundamental flaws and must be overturned.

ARGUMENT

I. THE CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS REQUIRES ONLY THAT STATES PROVIDE INMATES A "REASONABLY ADEQUATE OPPORTUNITY" TO PRESENT THEIR CLAIMS.

Rather than determining if Arizona's legal access program met the constitutional minimum of reasonably adequate access, the lower courts erroneously examined whether the program provided inmates with *optimal* access to legal materials and assistance. Thus, the lower courts' entire approach was fundamentally flawed.

The Fourteenth Amendment principles underlying inmates' right of access, and this Court's decisions construing that right, require only that States (1) not impose arbitrary barriers to inmate court access, and (2) provide the minimal materials and resources necessary for inmates to have a "reasonably adequate opportunity" to present a constitutional claim in court. Both the negative and the affirmative components of this so-called "right of access" involve only a minimal intrusion upon the States' wide discretion reasonably to regulate and control their prison facilities. Arizona's access program clearly meets this constitutional minimum.

A. Under the Equal Protection and Due Process Clauses, State Regulation of Inmates' Access to the Courts Is Not Subject to Heightened Scrutiny.

The United States Constitution contains no textual guarantee of a "right of access" to the courts, either for inmates or for anyone else. Nevertheless, this Court has held that the Constitution prohibits the imposition of arbitrary barriers to inmates' access to the courts, either as an element of equal protection, *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987), or as an element of due process, *Procunier v. Martinez*, 416 U.S. 396, 419 (1974), *overruled on other grounds, Thornburgh v.*

Abbott, 490 U.S. 401 (1989). *See Murray v. Giarratano*, 492 U.S. 1, 11 n.6 (1989).

1. The Equal Protection Clause of the Fourteenth Amendment prohibits classifications that are based upon impermissible criteria or that interfere with the exercise of fundamental rights. When a challenged classification does not involve a suspect class and does not implicate a fundamental right, the appropriate standard of review by a court is rational basis scrutiny. *City of Dallas v. Stanglin*, 490 U.S. 19, 23 (1989). Under rational basis review, state action implicating a particular group of persons, such as inmates, is permissible as long as it bears " 'some rational relationship to a legitimate state purpose.' " *Id.* (quoting *San Antonio Independent School Dist. v. Rodriquez*, 411 U.S. 1, 44 (1973)).

The rational basis standard applies to equal protection analysis of prison programs relating to court access. Inmates are not a "suspect" class for which courts must apply a heightened standard of scrutiny when evaluating equal protection claims and this Court has not included inmate access to law libraries or legal assistants in the limited category of fundamental rights to which heightened scrutiny applies.[8] Therefore, state action impairing inmates' ability to present claims (based solely upon their status as inmates) violates the Equal Protection Clause only if that state action is not rationally related to a legitimate state interest in running the prison efficiently or effectively. *Johnson v. Avery*, 393 U.S. 483 (1969).

[8] While the *Bounds* Court, in passing, did refer to "the fundamental constitutional right of access to the courts," 430 U.S. at 828, the Court did not indicate that it intended to include access to libraries or legal assistants in the limited category of constitutional rights to which heightened scrutiny applies. This Court has never used strict scrutiny to analyze prison regulations relating to court access, either in *Bounds* or in any other case. To the contrary, the Court made clear in *Turner v. Safley*, 482 U.S. 78, 89 (1987), that heightened scrutiny does not even apply to prison regulations that burden concededly fundamental rights of inmates.

But any restriction placed upon inmates (as opposed to non-inmates), or upon high risk inmates (as opposed to general population inmates), that rationally serves a legitimate government interest is unquestionably permissible under the Equal Protection Clause. Accordingly, to the extent that inmate "access to courts" claims implicate equal protection rights, the task for the courts is merely to determine whether the prison policy bears some rational relationship to unquestionably legitimate penal objectives.

2. The Due Process Clause of the Fourteenth Amendment prohibits the States from depriving individuals of liberty or property without due process of law. The substantive legal claims of the class in this case, that the inmates are seeking "access" to vindicate, generally implicate either liberty interests (i.e., habeas corpus claims) or property interests (i.e., constitutional claims for injunctive relief or damages). Thus, inmates are entitled to due process of law before these rights are impaired.

This case, however, does not involve inmates' rights to counsel in a criminal trial or appeal as of right. In such circumstances, all individuals, including prison inmates, are entitled to counsel pursuant to the Sixth Amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (trial); *Douglas v. California*, 372 U.S. 353 (1963) (appeal). Instead, this case involves only rights of "access" limited to post-conviction claims, such as federal habeas corpus, and civil rights claims. *Bounds*, 430 U.S. at 828 n.17 (court's "main concern here is 'protecting the ability of an inmate to prepare a petition or complaint' ") (citing *Wolff v. McDonnell*, 418 U.S. 539, 586 (1974)).

The Due Process Clause does not require the State to provide counsel to inmates who pursue discretionary appeals and post-conviction remedies. *Murray v. Giarratano*, 492 U.S. 1 (1989) (neither the Eighth Amendment nor the Due Process Clause requires States to appoint counsel

for indigent death row inmates seeking state post-conviction relief); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (state post-conviction relief); *Ross v. Moffitt*, 417 U.S. 600, 616 (1974) (discretionary appeals).[9] Nor has this Court ever recognized a right to counsel for inmates who bring civil claims.[10]

The issue in this case involves the States' due process obligations to inmates, including those without counsel, who are seeking access to the courts to pursue civil rights claims and post-conviction remedies. As set forth more fully below, state action that impairs inmates' ability to present their claims to a court will pass muster under the Due Process Clause if it does not arbitrarily impede access and, subject to legitimate penological restrictions, provides the materials and resources necessary to overcome the barriers to access inherent in the fact of incarceration.

3. *Turner v. Safley*, 482 U.S. 78 (1987), makes clear that rational basis scrutiny is the proper standard of review for a prison regulation that allegedly infringes inmates' constitutional rights. *Id.* at 89 ("when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests"). This standard is "necessary if 'prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations.'" *Id.* (quoting *Jones v. North Carolina Prisoners Union, Inc.*, 433 U.S. 119, 128 (1977)).

Turner identifies four factors that determine whether a prison policy that infringes on inmates' constitutional rights is reasonable: (1) whether there is a valid, rational connection between the prison policy and the legitimate governmental interest put forward to justify it; (2) whether the inmates have alternative means of exercising their constitutional right; (3) the impact that accommodation of the constitutional right will have on guards, other inmates, and the allocation of prison resources; and (4) whether the absence of ready alternatives is evidence of the reasonableness of the prison regulation. 482 U.S. at 89-90. With respect to the last factor, the Court emphasized that "[t]his is not a 'least restrictive alternative' test." *Id.* at 90; *see also id.* at 89 (heightened scrutiny would distort the decisionmaking process because "every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand"). Rather, "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id.* at 90.

B. Prison Policies and Practices Violate the Equal Protection and Due Process Clauses If They Impose Arbitrary Barriers to Inmates' Access to the Courts.

This Court's pre-*Bounds* cases focused on and invalidated state regulations that created hurdles, either in the form of special requirements or special limitations, for inmates seeking court access, hurdles that do not exist for non-inmates who wish to bring lawsuits. *Wolff v. McDonnell*, 418 U.S. 539 (1974) (Nebraska prison regulation prohibiting legal assistance from inmates other than the warden-designated inmate "legal advisor" violates right

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[9] Arizona exceeds constitutional requirements by affirmatively providing counsel to indigents in state court post-conviction proceedings. *Murray*, 492 U.S. at 12 n.7; Rule 32.4(c), Arizona Rules of Criminal Procedure. Thus, the court access sought by unrepresented inmates in Arizona's prison system is largely for the purpose of filing federal habeas corpus petitions and civil rights actions.

[10] Fee-shifting statutes like 42 U.S.C. § 1988, however, provide an economic incentive to attract counsel to meritorious civil rights cases. Such cases that do *not* attract counsel are probably too risky or "too unlikely to succeed." *See City of Burlington v. Dague*, 112 S.Ct. 2638, 2642 (1992); *Kay v. Ehrler*, 499 U.S. 432, 436 (1991).

of access); *Johnson v. Avery*, 393 U.S. 483, 490 (1969) (striking down Tennessee prison policy that prevented inmates from assisting other inmates in preparing "Writs or other legal matters"); *Ex parte Hull*, 312 U.S. 546, 549 (1941) (invalidating Michigan prison regulation allowing prison officials to confiscate inmate's petition for habeas corpus). While, unquestionably, the very nature of their confinement causes inmates certain obstacles to conducting litigation, these cases stand for the unremarkable proposition that due process prevents States from imposing additional arbitrary burdens on inmates' ability to engage in litigation.

In *Bounds v. Smith*, 430 U.S. 817 (1977), this Court held that the Constitution not only prohibits regulations that actively and arbitrarily interfere with inmates' access to the courts, but that States must provide basic supplies and access to legal materials—that are not otherwise available because of the condition of confinement—so that inmates can present their claims to the courts. This issue of an "affirmative duty" arises because inmates who are not represented by counsel may lack the basic resources necessary to present their claims; not only pens and paper, but also the ability to secure rudimentary legal knowledge and advice.

The Court held in *Bounds* that States have an obligation to "assist inmates in the preparation and filing of meaningful legal papers by providing inmates with adequate law libraries *or* adequate assistance from persons trained in the law." 430 U.S. at 828 (emphasis added). The Court also made clear that "indigent inmates must be provided at state expense with paper and pen to draft legal documents with notarial services to authenticate them, and with stamps to mail them." *Id.* at 824-25. Finally, the Court referred to its prior decisions holding that States must provide transcripts and waive filing fees for indigent inmates, just as they do for other indigent

citizens. *Id.* at 822 (citing *Smith v. Bennett*, 365 U.S. 708 (1961) (State may not require indigent inmate to pay a filing fee before docketing his application for a writ of habeas corpus); *Burns v. Ohio*, 360 U.S. 252 (1959) (State may not require indigent criminal defendant to pay a filing fee before seeking leave to appeal); and *Griffin v. Illinois*, 351 U.S. 12 (1956) (State must provide indigent criminal defendant with copy of trial transcript)).

In particular, the Court stated that the inquiry is "whether law libraries or other forms of legal assistance are needed to give inmates a *reasonably adequate opportunity* to present claimed violations of fundamental constitutional rights to the courts." *Bounds*, 430 U.S. at 825 (emphasis added). The "reasonable adequacy" standard had been used in the prison setting in this Court's prior decision in *Johnson*, 393 U.S. at 489 (State may not deprive "those unable themselves, with *reasonable adequacy*, to prepare their petitions" of legal assistance) (emphasis added); and in *Bounds*, 430 U.S. at 823, 824, 830 (State must provide inmates with "meaningful access" to the courts).

To determine the boundaries of a State's duty to permit "reasonably adequate" access, it is clear that—contrary to the holdings below—this Court did not intend to require *optimal* access, that is, the best access possible in the prison setting. Had the Court intended to ensure that inmate litigation be optimized, the Court simply would have mandated the appointment of counsel.[11] Instead, the Court's focus in *Bounds* was on ensuring that inmates have an opportunity—roughly equivalent to the

[11] Indeed, even inmates who have a Sixth Amendment right to counsel are entitled only to "effective" counsel, not "optimal" counsel. *See Lockhart v. Fretwell*, 113 S. Ct. 838 (1993); *Burger v. Kemp*, 483 U.S. 776, 794 (1987) ("in considering claims of ineffective assistance of counsel, we address not what is prudent or appropriate, but only what is constitutionally compelled") (internal quotation omitted); *Strickland v. Washington*, 466 U.S. 668 (1984).

opportunity available to similarly situated non-inmates—to present claims that are available to them and to file papers that are sufficient for the courts to evaluate. *Id.* at 825 (inquiry is whether inmates have "a reasonably adequate opportunity to present claimed violations"); *id.* at 828 (right of access is designed to ensure that inmate can file "meaningful legal papers"). A State that provides either law libraries [12] *or* legal assistance has provided inmates with a reasonable opportunity to understand whether they have claims and, if so, to set forth the necessary facts in a form that will permit courts to evaluate the inmates' complaints.

Moreover, the constitutional duty imposed upon the States is an obligation to ensure that inmates have access to the *courts*, rather than access to any particular type of library or form of legal assistance. *Id.* ("[A] legal access program need not include any particular element we have discussed, and we encourage local experimentation"). Prison libraries and legal assistants are a means to an end—that is, the provision of "reasonably adequate" access to the courts under existing notice pleading standards—not an end in themselves.

2. Inmates engaged in *pro se* litigation—unlike members of the bar—need only identify the general nature of their claims and the alleged facts supporting them. Pursuant to this Court's decision in *Haines v. Kerner*, 404 U.S. 519, 520 (1972), all federal circuits and many state courts evaluate pro se pleadings under "less stringent standards." [13] *See also Estelle v. Gamble*, 429 U.S. 97,

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[12] *Id.* at 830 ("adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts").

[13] *See, e.g., Strickler v. Waters*, 989 F.2d 1375, 1386-87 (4th Cir.), *cert. denied*, 114 S. Ct. 393 (1993); *Ruark v. Solano*, 928 F.2d 947, 949 (10th Cir. 1991); *Crooks v. Nix*, 872 F.2d 800, 801 (8th Cir. 1989); *Gobel v. Maricopa County*, 867 F.2d 1201, 1203 (9th Cir. 1989); *Childs v. Pellegrin*, 822 F.2d 1382, 1385 (6th Cir. 1987); *Simmons v. Dickhaut*, 804 F.2d 182, 184 (1st Cir. 1986); *Moore v. Florida*, 703 F.2d 516, 520 (11th Cir. 1983); *Robles v. Coughlin*, 725 F.2d 12, 15 (2d Cir. 1983); *Lewis v. Faulkner*, 689 F.2d 100, 102 (7th Cir. 1982); *Weaver v. Wilcox*, 650 F.2d 22, 26 (3d Cir. 1981); *Woodall v. Foti*, 648 F.2d 268, 271 (5th Cir. 1981); *Hudson v. Hardy*, 412 F.2d 1091, 1094 (D.C. Cir. 1968); *Breck v. Ulmer*, 745 P.2d 66, 75 (Alaska 1987), *cert. denied*, 485 U.S. 1023 (1988); *Findlay v. Lewis*, 831 P.2d 830, 837 (Ariz. App. 1991), *rev'd on other grounds*, 837 P.2d 145 (Ariz. 1992); *Apodaca v. Ommen*, 807 P.2d 939, 943 (Wyo. 1991); *Lo Sacco v. Young*, 564 A.2d 610, 612, 613 (Conn. App. 1989); *Blair v. Maynard*, 324 S.E.2d 391, 396 (W.Va. 1984); *Tedder v. Fairman*, 418 N.E.2d 91, 97 (Ill. App. 1981), *aff'd in part, rev'd in part*, 441 N.E.2d 311 (Ill. 1982).

106 (1976). Generally, a pleading will be dismissed for failure to state a claim only if it appears "'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Haines*, 404 U.S. at 521 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In practice, courts often go to extraordinary lengths to avoid dismissing potentially meritorious claims, liberally allowing inmates to amend their pleadings and even instructing them on how to do so.[14] When courts suspect that the inmate has a valid claim, they can appoint counsel to represent inmates, pursuant to 28 U.S.C. § 1915(d) (1994) for civil rights claims and 18 U.S.C. § 3006A(g) (1994) for federal habeas corpus petitions.[15]

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[14] *See, e.g., Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987) (giving civil rights litigants an opportunity to amend complaints while simultaneously advising them of potential meritorious theories of recovery); *Gordon v. Leeke*, 574 F.2d 1147, 1152-53 (4th Cir.), *cert. denied*, 439 U.S. 970 (1978).

[15] For federal habeas corpus petitions, 18 U.S.C. § 3006A(g) (1994) authorizes federal courts to appoint counsel if "the interests of justice so require." Counsel *must* be appointed for any habeas petitioner granted an evidentiary hearing. Rule 8(c), 28 U.S.C. foll. § 2254 (1994); *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984); *Swazo v. Wyoming Dep't*

Under the "notice pleading" system, courts apply the law liberally, regardless of whether inmates have cited appropriate legal authorities, presented legal analyses, or correctly identified their claims.[16] Inmates primarily need to present the facts underlying their claims, for which they can rely on their personal knowledge. The facts do not even need to be presented completely or precisely, as courts liberally grant leave to amend or appoint counsel when presented with ambiguous factual allegations that suggest a meritorious claim. Thus, the goal of inmate access requirements is not to "improve" inmate pleadings pursuant to some objective standard of quality. Instead, the goal is to ensure that inmates have the basic resources necessary to file minimally adequate

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of Corrections State Penitentiary Warden, 23 F.2d 332, 333 (10th Cir. 1994).

Courts use varying standards for appointing counsel for indigents in civil cases under 28 U.S.C. § 1915(d) (1994). *See e.g., Hahn v. McLey*, 737 F.2d 771, 774 (8th Cir. 1984) (per curiam) (appointment upon request if colorable claim presented); *Hodge v. Police Officers*, 802 F.2d 58, 60-61 (2d Cir. 1986) (multiple factor test, with threshold requirement that the indigent's position seems likely to be of substance). Even courts requiring a showing of "exceptional circumstances" allow the appointment of counsel where there is a likelihood of success on the merits and complex claims are at issue that the plaintiff has a limited ability to articulate. *Wood v. Housewright*, 900 F.2d 1332, 1335 (9th Cir. 1990).

[16] *See* American Bar Association, Judicial Administration Division, Standards Relating to Trial Courts, § 2.23 at 38-39, Conduct of Cases Where Litigants Appear Without Counsel (1992 ed.) ("[I]t is ultimately the judge's responsibility to see that the merits of a controversy are resolved fairly and justly. Fulfilling that responsibility may require that the court, while remaining neutral in consideration of the merits, assume more than a merely passive role in assuring that the merits are adequately presented. . . . Where litigants represent themselves, the court in the interest of fair determination of the merits should ask such questions and suggest the production of such evidence as may be necessary to supplement or clarify the litigants' presentation of the case").

pleadings that can be measured against the "notice pleading" standards.[17]

3. Finally, claims of inmate "access" to the courts should be weighed in light of the special need for judicial restraint in the area of prison decisionmaking. Such restraint rests upon this Court's acknowledgement of the greater expertise of prison officials concerning issues of penal management. *See Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989) (courts should defer to prison administrators in resolving the day-to-day problems in managing a prison, which lie within the expertise of prison officials). Because of the volatility and danger inherent in prisons, the risks of substituting courts for wardens and other administrators are unacceptable. Thus, only the clearest showings of constitutional injury can justify judicial intervention.

Judicial deference to the judgment of prison administrators stems not only from the judiciary's limited competence in penal management, but also from the doctrine of separation of powers. As this Court stated in *Bell v. Wolfish*, 441 U.S. 520, 548 (1979) (citing *Procunier*, 416 U.S. at 405):

> [J]udicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial.

Similar concerns were reiterated by the Court in *Turner v. Safley*, 482 U.S. at 84-85 (1987):

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[17] Reasonably adequate access "can be satisfied in various ways." *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J. and O'Connor, J. concurring in judgment). The manner in which *Bounds* is implemented, of course, is left to State legislatures and prison administrators who "must be given 'wide discretion' to select appropriate solutions." *Id.*

> Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint.[18]

In addition to separation of powers concerns, federalism concerns are implicated in this case. As this Court repeatedly has noted in the school desegregation context, State institutions and facilities should be run by State and local officials. *See, e.g., Missouri v. Jenkins,* 115 S. Ct. 2038, 2054 (1995); *Freeman v. Pitts,* 503 U.S. 467, 489 (1992); *Brown v. Board of Educ.,* 349 U.S. 294, 299 (1955). That principle applies with at least equal force when the federal courts attempt to manage the operations of State penal facilities. Thus, fundamental principles of federalism, as well as separation of powers, dictate that *Bounds*' limited requirement of access to the courts not become a license for comprehensive federal judicial supervision of State corrections facilities.

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In sum, due process and equal protection considerations impose two categories of limitations on State policies and practices affecting inmate access to the courts. First, a State may not impose arbitrary obstacles to inmates' ability to prepare and present claims to the courts. Second, a State must take reasonable steps, to the extent they are consistent with any legitimate penological interest, to eliminate barriers to court access that are inherent in the

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[18] Justice O'Connor, in a concurring opinion, recently affirmed that "[b]eyond the requirements of *Bounds*, the matter is one of legislative choice based on difficult policy considerations and the allocation of scarce legal resources." *Murray,* 492 U.S. at 13 (O'Connor, J., concurring).

fact of incarceration. This latter obligation simply means that, subject to limitations based upon security or other legitimate concerns, an inmate's ability to gain access to the courts from within the prison setting should be approximately the same as his ability to do so outside of the prison setting. As *Bounds* makes clear, access to basic materials and resources, either libraries or legal assistance, generally satisfies the State's obligation.

As long as a State complies with these limited and specific constitutional obligations, it should be the prerogative of State legislators and administrators to decide whether State funds should be spent on trying to improve the quality of inmate pleadings, as opposed to hiring additional prison guards or improving prison educational or recreational facilities—or, for that matter, increasing State spending on schools, parks or roads, or reducing taxes.

II. THIS CASE PRESENTS NO CONSTITUTIONAL VIOLATION BECAUSE ARIZONA'S PRISON POLICIES AND PRACTICES DO NOT IMPOSE ANY ARBITRARY BARRIERS TO ACCESS AND CLEARLY SATISFY THE STATE'S MINIMAL AFFIRMATIVE OBLIGATION TO PROVIDE MATERIALS AND RESOURCES NECESSARY TO PROVIDE "REASONABLY ADEQUATE ACCESS."

To establish a class-wide violation of their right of access, Respondents must show that Arizona's policies either impose arbitrary and irrational barriers to access for a significant portion of the class, or that the State fails to provide those minimal materials and resources that are necessary to overcome the inherent limitations of confinement. Neither showing was made in this case. The record clearly establishes that the State meets, and in significant respects exceeds, the minimum requirements set forth in *Bounds.* Accordingly, no class-wide violation has been demonstrated.

The courts below made two fundamental errors in concluding that there was a constitutional violation: (1) they ignored the elementary principle that plaintiffs attempting to establish a violation of Section 1983 must demonstrate both a constitutional injury and causation before they are entitled to relief; and (2) they measured Arizona's policies against an erroneous legal standard that far exceeds the minimal constitutional requirements.

A. Respondents Failed to Demonstrate That Any ADOC Policy Violated Their Access Rights by Causing a Cognizable Injury.

The lower courts erred by imposing liability on Petitioners without proof as to all of the essential elements of a claim of a constitutional violation, including both actual injury and causation. As this Court has noted, "[t]he plain words of [Section 1983] impose liability—whether in the form of payment of redressive damages or being placed under an injunction—only for conduct which 'subjects, or causes to be subjected' the complainant to a deprivation of rights secured by the Constitution and the laws." *Rizzo v. Goode*, 423 U.S. 364, 370-71 (1976). *See also* Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* 123 (2d ed. 1986) (Section 1983 "requires that a defendant's conduct be a cause in fact of plaintiff's constitutional deprivation.").

Most federal courts require inmates asserting "access to court" claims to demonstrate that some identifiable prison policy or resource deficiency caused them actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim. *See Strickler v. Waters*, 989 F.2d 1375, 1383 n.10 (4th Cir.), *cert. denied*, 114 S. Ct. 393 (1993) (citing cases).[19] The district court in this case applied

[19] *See, e.g., Crawford-El v. Britton*, 951 F.2d 1314, 1322 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 62 (1992) (deprivation must be linked to an "adverse litigation effect"); *Shango v. Jurich*, 965 F.2d 289, 292 (7th Cir. 1992) (complainant must show "some quantum of detriment caused by the challenged conduct of state officials *resulting in the interruption and/or delay of plaintiff's pending or contemplated litigation*" (emphasis in original)); *Twyman v. Crisp*, 584 F.2d 352, 357 (10th Cir. 1978) (injury requirement not satisfied where complainant failed to allege "that any of his multitudinous filings have been stricken as untimely or that any of his cases have been dismissed or otherwise prejudiced" by having to file for extensions of time).

the Ninth Circuit's two-tiered approach,[20] which imposes no actual injury requirement when the complaint involves a "core" *Bounds* issue (such as inadequate law libraries or legal assistance), but requires a constitutional injury to be demonstrated in complaints involving other access issues. Pet. App. B at 41a, citing *Sands v. Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989).[21]

The purpose of the injury and causation requirements is to determine whether the prison policy complained of, such as the library hours, "actually deprived the prisoner of access to the courts." *Vandelft v. Moses*, 31 F.3d 794, 797 (9th Cir. 1994), *petition for cert. filed* (U.S. Apr. 12, 1995) (No. 94-8879). Since the constitutional right at issue is to court access—rather than to libraries or legal assistants, *per se*—the right is violated only when prison policies result in *actual* denial of court access. *Id.* In the absence of this requirement, inmates could seek and obtain relief—as in this case—based on generalized complaints about their law library or legal assistance program, even when the alleged "deficiencies" have not resulted in any

[20] The Ninth Circuit affirmed the injunction without addressing Petitioners' argument that the district court erred in granting relief without finding actual injury. *See* Pet. 8 n.6.

[21] This approach has not been followed consistently in the Ninth Circuit. *See Johnson v. Moore*, 948 F.2d 517, 521 (9th Cir. 1991) (imposing actual injury requirement in case involving allegations of library inadequacy).

deprivation of a constitutional right. *See Rizzo*, 423 U.S. at 370-71.

The Ninth Circuit's approach also leaves courts without a judicially manageable standard for determining whether constitutional requirements are satisfied. Courts are well-equipped to hear and decide questions of causation and injury based on past events. They are ill-equipped, however, to decide questions such as how many books should go in a library, how many hours the library should remain open, what access inmates should have to the stacks, or how legal assistants and librarians should be trained. Such questions of policy are legislative and administrative, rather than judicial, in nature. When these questions are left to the courts, judges may implement their own visions and ideals for State prisons, thereby usurping legislative and executive functions in violation of the principle of separation of powers and, in this case, federalism as well.

Here, there were no constitutional violations established based upon the application of any State policies. The district court made no findings that *any* ADOC policy or practice caused any inmate to suffer actual injury, such as the inability to prepare a pleading or to meet a filing deadline.[22] Yet, despite the absence of this essential element of a Section 1983 violation, the district court ordered comprehensive system-wide relief. In effect, the district court ordered relief based upon the perceived possibility that future deprivations *might* occur, a possibility that

[22] The district court did find one instance in which an illiterate inmate had his claim dismissed with prejudice and one instance in which an illiterate inmate was unable to file a legal action. Pet. App. B at 25a; 884 F. Supp. at 1558. Arizona has met its constitutional obligations with respect to illiterate and non-English speaking prisoners. *See infra* at 35. Accordingly, any lack of access experienced by these two inmates is not attributable to unconstitutional State policies and does not constitute constitutionally cognizable injury.

exists in any prison system regardless of the scope and extent of the resources it makes available. Possible harm, however, provides no justification for federal judicial intervention. In the absence of an injury of constitutional magnitude, there simply is no basis on which to sustain the finding of liability, and the judgment below should be reversed in its entirety.[23]

B. No Violation Has Been Demonstrated Because ADOC's Policies Impose No Arbitrary Barriers and Meet the Minimal Affirmative Obligation to Provide Resources Necessary to Provide Reasonably Adequate Access.

Arizona does not impose any arbitrary barriers to access for inmates incarcerated in its prisons, and Respondents effectively concede as much. Thus, the only issue is whether the State has provided the minimal resources that are necessary to provide reasonably adequate access. The record establishes that the State meets, and in several respects exceeds, its affirmative obligation to provide basic legal resources and supplies. Accordingly, because Arizona's programs comply on their face with Fourteenth Amendment requirements and there are no findings of actual injury resulting from these programs, no system-wide violation has been demonstrated.

Most circuits have correctly interpreted *Bounds* to mean what it says and require only "adequate law libraries or adequate assistance from persons trained in the law," but not both. *See Campbell v. Miller*, 787 F.2d 217, 229-30

[23] Although the lack of a showing of injury means that Respondents are not entitled to any relief, the State does not contend that the Respondents lacked standing to raise these claims in the first instance. Respondents clearly met the threshold of an actual case or controversy pursuant to Article III of the United States Constitution. They simply failed to prove the existence of a constitutional violation, including causation of injury, that would entitle them to relief under Section 1983.

(7th Cir.), *cert. denied*, 479 U.S. 1019 (1986); *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 855 (9th Cir. 1985); *Morrow v. Harwell*, 768 F.2d 619, 623 (5th Cir. 1985); *Hooks v. Wainwright*, 775 F.2d 1433, 1435 (11th Cir. 1985) ("*Bounds* refers to law libraries *or* other forms of legal assistance, in the disjunctive, no fewer than five times" (emphasis in original)), *cert. denied*, 479 U.S. 913 (1986); and *Cepulonis v. Fair*, 732 F.2d 1, 6 (1st Cir. 1984). Perhaps the clearest indication that *Bounds* requires *either* law libraries *or* legal assistants is the portion of this Court's opinion approving the district court's approach to devising a remedy for the constitutional violation:

> [The district court] did not thereupon thrust itself into prison administration. Rather, it ordered [prison officials] themselves to devise a remedy for the violation, strongly suggesting that it would prefer a plan providing trained legal advisors. [Prison officials] chose to establish law libraries, however, and their plan was approved with only minimal changes over the strong objection of [inmates]. Prison administrators thus exercised wide discretion within the bounds of constitutional requirements of this case.

Bounds, 430 U.S. at 832-33.

Arizona's prison libraries are unquestionably adequate under any concept of "reasonably adequate" access. Stocked with at least the extensive "Muecke List" of books, the prison law libraries are arguably better equipped than many law firm libraries in Arizona. Whatever the constitutional minimum for legal materials, Arizona certainly meets and exceeds it, without the additional requirements imposed by the injunction. The State, however, does not merely satisfy *Bounds*' disjunctive requirements; it in fact surpasses them by providing both comprehensive law libraries *and* legal assistance to inmates. These two resources ensure that inmates have a reasonably adequate opportunity to satisfy the notice pleading requirements.

Illiterate and non-English speaking inmates have physical access to excellent libraries, *plus* help from legal assistants and law clerks. This access fulfills the specific "libraries or assistance" holding of *Bounds*. Nothing in *Bounds* suggests—as the Ninth Circuit here assumed—that States are constitutionally obligated to furnish trained, bilingual legal assistance to inmates who have access to more than adequate law libraries.

Petitioners recognize that non-English speaking and illiterate inmates face special problems in obtaining court access, even when they have access to libraries and legal assistants. While this is unfortunate, it is also true of non-English speaking and illiterate citizens who are not in prison. Non-incarcerated individuals with these limitations must do the best they can with their limited English skills, and with the help of others. If they cannot find help, their rights might go unvindicated. *Bounds* merely requires that States not make illiterate and non-English speaking individuals *worse* off by virtue of their incarceration. In this case, there has ben no finding that inmates in Arizona are worse off than non-incarcerated citizens.

The result of the lower court's broad interpretation of *Bounds* is that convicted criminals sentenced to prison enjoy far greater legal resources in pursuing civil actions than law-abiding citizens. This Court should overturn this expansion of *Bounds*. A State like Arizona that provides both law libraries with collections such as those provided to Arizona inmates, and legal assistants who are familiar with the types of claims that inmates are likely to raise, has provided inmates with a "reasonably adequate" and "meaningful" opportunity to present their habeas and civil rights claims to a court. Given a court's duty to liberally construe *pro se* pleadings and analyze an inmate's factual allegations in light of the applicable law, the resources Arizona provides assure that inmates can file pleadings that courts can fully and fairly evaluate.

Finally, the State's restrictions on library access for the 261 lockdown inmates do not violate those inmates' right of access because they clearly bear a rational relationship to legitimate State penological interests under *Turner*. *See supra* at p. 20. Because there were no findings that any of these inmates suffered actual injury as a result of these restrictions, no remedy should issue.

This Court should overturn the dramatic expansion of *Bounds* from a decision requiring the minimal resources necessary to permit an inmate to present a claim to a court into a license for a federal court to micromanage prison operations and facilities. *Bounds* established the foundation for what is necessary to ensure inmates' access to the courts. If a State provides either adequate law libraries or legal assistants who are familiar with the types of claims that inmates are likely to raise, then the State has provided inmates with a "reasonably adequate" or "meaningful" opportunity to present their claims to a court. No more is constitutionally required.

III. ASSUMING ARGUENDO THAT SOME CONSTITUTIONAL VIOLATION WAS ESTABLISHED IN THIS CASE, THE REMEDY ORDERED BY THE DISTRICT COURT FAR EXCEEDS THE PROPER SCOPE OF ANY CONSTITUTIONALLY APPROPRIATE REMEDY.

The district court's injunction is a minutely detailed plan for running the Arizona prison system, establishing requirements for every conceivable aspect of court access, from the number of envelopes and sheets of paper that each inmate must be provided per week (Pet. App. C at 79a), to the price that may be charged for photocopies (*id.* at 77a). The injunction reads like a regulatory code and is, for all practical purposes, just that—a *permanent* set of judicially-imposed guidelines, pursuant to which the special master would administer a significant segment of the Arizona prison system for the foreseeable future.

By imposing this injunction, the courts below have granted the special master control over a significant portion of the Arizona Legislature's spending power.

The precise bases for the various components of the district court's remedial decree is unclear. For example, the court does not hold that the actual hours of operation of the libraries or the precise educational backgrounds of librarians independently violate the Constitution. Accordingly, the components of the decree do not directly remedy any specific constitutional wrong. If there is a basis for imposing some relief, these components cannot be justified as a proper exercise of remedial discretion given the very limited nature of any constitutional violation that is supported by the record in this case.

Thus, if the record supports some findings that one or two inmates suffered constitutional injury as a result of ADOC's "access" policies and practices, the injunction imposed upon ADOC in this case must be reversed in its entirety because of the failure of the courts below to tailor the injunction to remedy any particularized constitutional violations. In light of the State's compliance with the Constitution's requirements for inmate access to the courts, no basis exists to support the far-reaching injunctive remedy imposed by the courts below. Moreover, an examination of the individual components of the injunction—and the absence of any constitutional support for those components—warrants reversal of the judgment below.

A. The Injunction Must Be Reversed in Its Entirety Because It Is Not Narrowly Tailored.

The expansive district court injunction violates the fundamental principle that equitable remedies must be narrowly tailored to address specific constitutional violations. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("the scope of injunctive relief is dictated by the extent of

the violation established"); *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) ("*Milliken I*") ("a federal remedial power may be exercised 'only on the basis of a constitutional violation' and, '[a]s with any equity case, the nature of the violation determines the scope of the remedy' ") (quoting *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 16 (1971)); *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) ("*Milliken II*") ("federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation").

Just last Term, in *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995), this Court reversed a district court injunction in a school desegregation case because the injunction exceeded the court's remedial authority to address specific constitutional violations. The purpose of the remedy was inter-district, to attract non-minority students from outside the school district, whereas the constitutional violation was intra-district. The Court chastised the lower court's pursuit of "desegregative attractiveness" as the "hook on which to hang numerous policy choices about improving the quality of education in general within the [school district]." 115 S. Ct. at 2054 (internal quotation omitted). *See also Dayton Bd. of Education v. Brinkman*, 433 U.S. 406, 417 (1977) (instead of tailoring injunctive remedy commensurate with specific constitutional violations, court improperly imposed system-wide remedy); *Keyes v. School Dist. No. 1, Denver, Colorado*, 413 U.S. 189, 213 (1973) (only if there has been a system-wide impact may there be a system-wide remedy).

The district court's injunction in this case, like the order in *Jenkins*, exceeds the court's remedial authority and intrudes on Arizona's legislative and executive prerogatives. The injunction is not limited to curing any demonstrated constitutional violation. It is, instead, simply a "wish list" that embodies the district court's goals

for penal reform. Like the lower courts in *Jenkins*, the courts here have used the inmates' generalized claims of lack of access as a "hook on which to hang numerous policy choices about improving" their lot in general. *See Jenkins*, 115 S. Ct. at 2054.[24]

In sum, even if Respondents could point to some ADOC policies or practices that have, in particular circumstances, led to an actual impairment of an inmate's right of access to the courts, the injunction issued by the courts below far exceeds any measure of the remedial power necessary to remedy such violations. By imposing their expansive vision of "appropriate" prison access requirements, in the absence of any hint of comparably expansive violations, the courts below have overstepped their constitutional authority. Accordingly, the judgment below must be reversed.

B. The Individual Components of the Remedy Are Not Supported by Any Finding of Violation and Are Overbroad.

Even if the gross overbreadth of the injunction did not mandate its reversal in its entirety, the particular components of the injunction, examined in isolation, also are overbroad and not adequately supported by any finding of a constitutional violation. Each of the particular commands of the injunction, from library contents to access to counsel, is completely unsupported by any particularized finding of constitutional injury necessary to support the relief sought. Accordingly, the judgment below should be reversed.

1. *Library contents and staffing.* Arizona's prison libraries are adequate under any concept of "reasonably

[24] The injunction in this case actually is far more problematic than the one in *Jenkins*. While the existence of an underlying and system-wide constitutional violation was undisputed in *Jenkins*, in this case there is no constitutional violation that justifies the exercise of federal remedial power. *See* Section II.

adequate" and "meaningful" access. *See, supra*, at 3-9. The district court even observed that "the facilities appear to have complete libraries." Pet. App. B at 33a, 46a.

Despite this observation, the district court concluded that self-help manuals and Pacific Digests and Reporters are "necessary for the inmates to pursue their cases," Pet. App. at 46a, 69a. But regional reporters certainly are not constitutionally required; the law library collection approved in *Bounds* did not contain them. *See Bounds*, 430 U.S. at 819 n.4; *see also Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 856 (9th Cir. 1985) (Pacific Reporter not required). Nor is it clear how regional reporters could be "necessary" to Arizona inmates, given that the prison libraries contain the Arizona Reports.[25] In essence, the district court ordered this additional set of books because it thought them desirable, thereby equating what is *desirable* with what is *constitutionally required*.

The district court also erred in requiring Arizona to hire full-time, professionally trained librarians with law, paralegal, or library science degrees for every library. Pet. App. C at 67a. In so ruling, the court exercised its injunctive authority, not upon a showing of constitutional need, but on a judicial "guess" about what resources might improve inmates' litigation opportunities. There is no finding, and no evidence in the record to support a finding, that Arizona's current library staff is constitutionally inadequate or that inmates have been denied court access because the librarians were underqualified. Accordingly, the district court exceeded its authority in requiring the State to expend funds to recruit and hire

[25] Contrary to Respondents' position in the Ninth Circuit, it is not Arizona's obligation to provide regional reporters for out-of-state prisoners incarcerated in Arizona who desire out-of-state legal materials; that is, if anything, the sending State's obligation. *Boyd v. Wood*, 82 F.3d 820, 821 (9th Cir. 1996).

individuals with advanced degrees to serve as law librarians.

2. *Library hours.* Arizona's existing policy with respect to library hours is reasonable. It is predicated on the rationale that actual use should dictate the hours of operation. Indeed, there is no finding, and no evidence in the record to support a finding, that inmates have been denied court access because of inadequate library hours. Accordingly, the additional requirements imposed by the injunction constitute improper judicial micromanagement.

3. *Library access.* Arizona provides inmates liberal access to libraries, permitting them direct access to the stacks in most facilities. *See supra* at 5-6. The 261 high-risk inmates who have been placed in lockdown facilities for disciplinary or other violations are excepted. Nevertheless, they still have access to library materials through a paging, or book-retrieval, system as well as access to legal assistants. Prison officials adopted the paging system because: (1) forbidding lockdown inmates from mixing with general population inmates in law libraries is necessary to ensure inmate safety and prevent the exchange of contraband; and (2) transporting lockdown inmates, who must remain in restraints and be accompanied by two-guard escorts, from their cells to the law library would misspend limited State resources and create a logistical nightmare. *See supra* at 6.

The district court concluded that the paging system was inadequate and ordered ADOC to provide "prisoners in all housing areas and custody levels" with "regular and comparable visits to the law library," unless the inmate had a "documented inability to use the law library without creating a threat to safety or security." Pet. App. B at 61a. In affirming this requirement, the Ninth Circuit emphasized that "legal research often requires browsing through various materials in search of inspiration." Pet. App. A at 7a, 43 F.3d at 1267 (quoting *Toussaint v.*

McCarthy, 801 F.2d 1080, 1109 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987)).

As an initial matter, the district court's implicit conclusion that prisons are constitutionally compelled to allow inmates to "browse" the shelves of law libraries cannot be sustained. Many public and private libraries, including the Library of Congress, do not allow patrons to have access to the stacks. *See DeMallory v. Cullen*, 855 F.2d 442, 451 (7th Cir. 1988) (Easterbrook, J., dissenting). Since ordinary citizens must abide by the "paging" systems used in such libraries, greater access for inmates cannot be constitutionally required under *Bounds*.

Moreover, the injunction relies on a purely fictional view of legal research as conducted by attorneys, much less as conducted by inmates. Law libraries primarily contain case reporters, which are virtually useless unless one knows—in advance—the citation sought. The notion that anyone could conduct meaningful research by wandering aimlessly down the aisles of a law library "in search of inspiration" is misplaced. The odds of stumbling onto dispositive opinions while thumbing through hundreds of volumes of 1500-page reporters are extremely remote.

In any event, ADOC's reasons for denying lockdown prisoners physical access to the libraries are reasonably related to its legitimate penological interests under all four of the factors that this Court identified in *Turner*. First, there is clearly a rational connection between the prison policy and the prison's interests in preserving security, avoiding logistical problems and allocating resources efficiently. The purpose of placing high-risk inmates in "lockdown" facilities is to segregate them from other inmates and to increase their level of confinement. Once inmates have been "locked down," it is clearly rational to have a paging system by which books are brought to them rather than allowing inmates to go to the prison library.

Second, the paging system provides an "alternative means" for inmates to exercise their right of access. Segregated inmates may request law books through ADOC staff, inmate legal assistants, or inmate law clerks. Books are then retrieved for the lockdown inmate according to the inmate's request, whether it be general or specific.[26]

Third, forcing ADOC officials to allow segregated inmates physical access to the library would unquestionably impose an undue burden on guards, other inmates, and the allocation of prison resources. Prison officials need not accommodate a constitutional right at the expense of "significantly less liberty and safety for everyone else, guards and prisoners alike." *Turner*, 482 U.S. at 92. Rather, courts are encouraged to defer to the informed discretion of corrections officials. *Id.* at 90. Requiring ADOC to transport high-risk inmates to the library under escort, where those inmates could pose a security risk to general-population inmates, forces ADOC to devote its resources to library research excursions that can, and should, be satisfied through other avenues reasonably chosen by prison officials.

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[26] Testimony from three lockdown inmates conflicted with that of ADOC staff as to whether inmates are required to provide exact citations for the books they request and how many books they are permitted to keep in their cells. Pet. App. B at 22a. Even accepting the inmates' testimony, however, the problems experienced by only three inmates would justify at most a narrow injunction requiring ADOC officials to retrieve law books for lockdown inmates when the request is of a general nature. The testimony of three inmates concerning their personal accounts of uncooperative staff members did not warrant the district court's conclusion that there existed a systemic, widespread practice within the State. That the extensive legal assistant training program presumably was built upon the episodic experience of these three inmates similarly displays little deference to prison officials or respect for the principle that the injunction must be narrowly tailored to cure the specific constitutional violation.

Turner's fourth factor—whether there are "ready alternatives" such that the chosen regulation is an "exaggerated response" to prison concerns—similarly supports the reasonableness of the policy. This factor requires prison officials to show only that their rejection of a less restrictive alternative was based on "reasonably founded fears that it will lead to greater harm." *Thornburgh*, 490 U.S. at 419. ADOC's use of a paging system for lockdown inmates certainly is not an "exaggerated response" to prison officials' legitimate penological interests in safety and the economical use of prison resources. Prison officials made the reasonable administrative judgment, to which the district court should have deferred, that less restrictive policies for lockdown inmates posed a legitimate threat of greater harm in the volatile prison setting.

The only exception to physical access permitted by the courts below—where ADOC officials have documented a particular inmate's "inability to use the law library without creating a threat to safety or security"—interferes with the prison officials' wide discretion to anticipate and avoid harm before it occurs. *See Thornburgh*, 490 U.S. at 417 (upholding prison regulations designed to avoid situations that "although not necessarily 'likely' to lead to violence, [were] determined by the warden to create an intolerable risk of disorder"). Both *Thornburgh*, 490 U.S. at 418, and *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987), reject the notion that prison officials must wait for actual harm to occur before taking action. Furthermore, the inmates in this case cannot satisfy their burden of pointing to an alternative that accommodates their rights at *de minimis* costs to security interests. *Turner*, 482 U.S. at 91.

4. *Legal assistance.* In all ADOC prison facilities, volunteer inmate legal assistants are available to assist other inmates in preparing their pleadings. In addition to the formal legal assistant training program in the Central

Unit in Florence, and the program for inmate legal assistants conducted at the Tucson complex in July 1990, many legal assistants have completed or are currently taking paralegal courses. Pet. App. B at 31a; R.T. 1/7/92 at 186-187.

For two reasons, the lower courts erred when ordering ADOC to implement the legal assistant training program. First, the Constitution does not require States to do anything more than remove the barriers to court access that imprisonment erected. *Hooks v. Wainwright*, 775 F.2d 1433 (11th Cir. 1985), *cert. denied*, 479 U.S. 913 (1986). Here, the barriers to court access erected by imprisonment were removed by making the law libraries available to all inmates. That certain ADOC inmates are illiterate or do not speak English does not place them on any different footing than that occupied by persons who are not convicted felons. Moreover, even the case relied on by the district court, *Cruz v. Hauck*, 627 F.2d 710 (5th Cir. 1980), stated that "[l]ibrary-use assistance [by writ writers] might solve the problem presented." *Id.* at 721.

Second, Respondents failed to offer evidence that any inmate was prevented from exercising his right of access to the courts by virtue of insufficiently trained legal assistants. Therefore, the injunction's requirement that Petitioners hire lawyers, paralegals or law students to teach a thirty to forty-hour training course at each law library every six months *ad infinitum*, is clearly improper.

5. *Functionally illiterate inmates.* Illiterate and non-English speaking inmates have access to Arizona's fully stocked prison libraries, *plus* help from legal assistants. This fulfills constitutional requirements because these inmates are *better* off than their non-incarcerated counterparts. Accordingly, the injunction's requirement that Arizona furnish trained, bilingual legal assistants to all inmates is yet another attempt to achieve optimal access, rather than "reasonably adequate" access.

6. *Access to counsel.* ADOC's policy states that most communications between inmates and their attorneys should be by written correspondence or in-person visits. Attorney-client telephone calls are administratively burdensome because inmates must be taken out of their cells to use a limited number of phones. Accordingly, inmates must request permission to make phone calls to their attorneys and must provide a reason why written correspondence or a visit will not suffice.

The injunction requires that each and every inmate, regardless of custody status or need, be allowed "a weekly *minimum* of three twenty-minute calls to (1) an attorney, (2) a designated attorney representative, or (3) a legal organization." Pet. App. C at 76a (emphasis added). ADOC must purchase a sufficient number of phones so that these calls can be made during regular business hours. *Id.*

This burdensome requirement is unjustified. The district court did not find that ADOC's current policy denies inmates reasonable contact with existing or potential attorneys, much less that any inmate has suffered an actual injury to his due process or equal protection rights. Accordingly, the district court had no authority to grant any relief. Even if there were some basis for relief, however, the mandatory minimum of three phone calls per inmate per week is not a narrowly tailored remedy. This blanket policy allows phone calls on demand for all inmates, even when they have no pending deadline—or even any pending litigation—and in circumstances in which communication by letter or in-person is available and appropriate.

Affirmance of this judicially-imposed policy will create a huge administrative burden, particularly with respect to lockdown inmates, who must be transported to and from their cells with a two-guard escort. Because there was no showing that the current practice failed to meet constitutional requirements, this aspect of the injunction is another improper attempt to ensure optimal access.

7. *Photocopying.* The district court erroneously concluded that ADOC needed a policy to assure that legal documents to be photocopied were not read by other inmates or staff. Pet. App. B at 47a. The injunction requires that Petitioners post a bulletin in the law libraries warning staff members not to read legal materials being copied. Pet. App. C at 77a. In addition, the injunction goes so far as to set forth the amount per page Petitioners can charge inmates for copies.

The injunction was ordered despite the fact that ADOC already had in place a policy prohibiting library staff from reading legal materials. In addition, Respondents presented evidence from only *one* inmate that prison staff had supposedly read legal materials. Most importantly, Respondents never contended that the manner in which legal materials were photocopied deprived any inmate of his right of access to the court. Therefore, the lower courts clearly erred in finding a constitutional violation as a result of this policy.

* * * *

Operating a prison system is the business of State officials. State administrators have wide discretion to run their prisons so long as they do not run afoul of the minimal requirements imposed by the Constitution. State administrators are precluded from imposing arbitrary barriers to an inmate's exercise of the right to file papers in court or to allow the fact of imprisonment to serve as an obstacle to filing a judicial claim that would not be faced by an ordinary citizen. But these are limited restrictions on the State, and the findings and record cannot justify the extraordinary and system-wide remedy imposed by the district court here, which ignores the State's legitimate penological interests, violates core federalism values, and undermines separation of powers principles. In a mis-

guided effort to "optimize" each inmate's ability to litigate against the State, the district court has arrogated to itself the authority to exercise the State legislature's spending power. But the "dream" that animated the district court to play executive official, unless reversed, will be the State's "nightmare" in attempting to balance prison security, legitimate cost concerns and the minute commands of a federal court. Not only does the Fourteenth Amendment not require this distortion of institutional roles, but Article III affirmatively condemns it.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

REX E. LEE
CARTER G. PHILLIPS
MARK D. HOPSON
JACQUELINE GERSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

GRANT WOODS
Attorney General
C. TIM DELANEY
REBECCA WHITE BERCH
THOMAS J. DENNIS
ARIZONA ATTORNEY
GENERAL'S OFFICE
1275 W. Washington
Phoenix, Arizona 85007
(602) 542-3333

DANIEL P. STRUCK
Counsel of Record
KATHLEEN L. WIENEKE
DAVID C. LEWIS
EILEEN J. DENNIS
JONES, SKELTON & HOCHULI
2901 N. Central Avenue
Suite 800
Phoenix, Arizona 85012
(602) 263-1700
Attorneys for Petitioners

APPENDIX

APPENDIX A

LEWIS v. CASEY

	No. of Inmates	"Muecke List" Books	Library Hours	Shelf Browsing Permitted	Legal Ass'ts Law Clerks Correc.Sec.Off.
ASPC-FLORENCE					
Women's Division	190	X*	M-F 8A-3:30P; T,W 10A-6P; Th 8A-3P (38 hours/week)	Yes	1-C.S.O.; 2-L.C. 5-L.A.
South Unit	409	X	T-Sat 7A-3P (40 hours/week)	No	9-L.A.; 3-L.C. 1-C.S.O.
Cellblock Six (CB-6)	180	X*	M-Su 7A-10P (105 hours/week)	No	3-L.A.; 4-L.C.** 1-C.S.O.
North Unit	391	X*	M-F 8A-3:30P; T-Th 10:30a-6:30P (31 hours/week)	Yes	1-L.A.; 2-L.C.** 1-C.S.O.
Picacho Work Camp use North -- see above	203				
East Unit	430	X*	M-F 10A-6P (Closed 3-4 for Count) (35 hours/week)	Yes	7-L.A.; 2-L.C. 1-C.S.O.
Rynning	800	X	M-F 7A-8:15P (66 hours/week)	Yes	5-L.C.; 11-L.A. 2-C.S.O.
Special Management Unit (SMU)	90 I-3's 822 I-5's	X*	(I-3's) T-SA 6P-8P (I-5's) M 7A-3P, T-F 7A-9P Sa 1P-9P (82 hours/week)	No	11-L.A.; 3-L.C. 1-C.S.O.
ASPC-PHOENIX					
Alhambra Reception Center	192	X*	M-F 7:30A-8:30P; Sa,Sun 8:A-10P (93 hours/week)	No	2-L.A.; 2-L.C.
Flamenco Mental Health Unit use Alhambra -- see above	48				
Aspen DWI Center use Alhambra -- see above	248				
Arizona Center for Women (ACW)	350	X*	M-F 1P-9P (40 hours/week)	Yes	2-L.C.
Globe	120	X		Yes	
ASPC-DOUGLAS					
Gila Unit	632	X*	M-F: 12P-3:30P, 5P-9P Sat,Sun: 8A-10:30A, 12:30P-3:30P (48.5 hours/week)	Yes	3-L.C. 1-Librarian
Maricopa use Gila -- see above	129				
Mohave Unit	872	X*	M-F 1P-3:30P and 5P-9P; Sa,Sun: 8A-10:30A, 12:30P-3:30P (43.5 hours/week)	Yes	2-L.A.; 3-L.C.** 1-Librarian
Papago DWI use Mohave -- see above	208				
Cochise Complex Detention Unit use Mohave -- see above	66				

	No. of Inmates	"Muecke List" Books	Library Hours	Shelf Browsing Permitted	Legal Ass'ts Law Clerks Correc.Sec.Off.
ASPC-PERRYVILLE					
Santa Cruz Unit	744	X*	M-Th:1P-9P; F:8A-4P (40 hours/week)	No	2-L.C.; 1-C.S.O.**
CDU use Santa Cruz – see above	40				
San Juan Unit	744	X*	M-Th:1P-9P; F:8A-4P (40 hours/week)	No	3-L.C.; 1-C.S.O. 1-Librarian
San Pedro	432	X*	M-F:7A-11A,; 2P-4P,6P-8P (same hours on Sat and Sun) (if officer available) (40 hours/week)	No	2-L.A.; 3-L.C. 1-C.S.O.
Santa Maria Unit	302	X*	M-F:8A-8P (60 hours/week)	No	2-L.A.; 3-L.C.** 1-C.S.O.
ASPC-TUCSON					
Cimarron Unit	748	X***	61 hours/week	Yes	13-L.A.; 2-L.C.
Echo	249	X***	76 hours/week	Yes	1-L.A.; 1-L.C. 1-Librarian
Rincon	662	X***	80 hours/week	Yes	5-L.A.; 5-L.C. 1-Librarian
Santa Rita	660	X***	M-Sa:8:30A-3P; T,Th:5P-6:30P (42 hours/week)	Yes	7-L.A.; 1-Librarian
CDU use Santa Rita – see above	71				
ASPC-WINSLOW					
Coronado	600	X*	M,T,W,F: 1P-4P and 4:30-9P; Th:1P-3:30P and 6:30P-9P; Sat:9A-11A (37hours/week)	No	4-L.A.**; 2-L.C. 1-Librarian
Kaibab	716	X*	M-F:7A-9P (60 hours/week)	No	5-L.A.; 3-L.C.** 1-Librarian
CDU use Kaibab – see above	36				
ASPC-SAFFORD	476				
Graham		X		Yes	
Tonto		X		Yes	
ASPC-YUMA	243	X		Yes	
ASPC-FORT GRANT	632	X		Yes	

* Law libraries which exceed volumes contained on the Muecke List.
** Spanish speaking law library personnel available.
*** Respondents admitted to the sufficiency of the law library collections at all ASPC Tucson units.